QUESTIONS PRESENTED

Whether the Court of Appeals' reversal, based on its finding of direct evidence of intent to discriminate on the basis of race on the part of the former Mayor of Philadelphia, violated the constraint of Federal Rule of Civil Procedure 52 (a) which limits reversals to clearly erroneous findings?

Whether evidence of statistical under-representation of black persons combined with an opportunity to discriminate is the appropriate formula to shift the burden of proof in this case:

(1) where the chief elected official's discretionary power of appointment is being reviewed by the Court;
(2) where the qualifications for appointment are definite and limiting and have never been subjected to constitutional attack;
(3) where, regardless of the executive's involvement and the limiting qualifications, the positions available are so small in absolute number as to make statistical under-representation inconclusive; and
(4) where the unrebutted evidence discloses that under former Mayor Tate, minorities made impressive advancements in all fields and at all levels of City government?

Whether the Court of Appeals was justified in fashioning its Order prospectively where the foundation of its holdings was based on evidence of practices of former Mayor Tate's administration and where absolutely no evidence exists that the present Mayor, Frank L. Rizzo, not a party to the action, has discriminated on the basis of race.

STATUTORY PROVISIONS INVOLVED

United States Constitution, Article II:

> Section 2. The President . . . shall nominate and, by and with the advice and consent of the Senate, shall appoint . . . all other officers of the United States. . . . But the Congress may by law vest the appointment of such inferior officers, as they think proper in the President along. . . .

First Class City Public Education Home Rule Act of August 9, 1963, P.L. 643 [53 P.S. §13202 (Pocket Part 1972-73)]:

> **Article II, Section 2: Cities empowered.** Any city of the first class may frame and adopt charter provisions governing the administration of a separate and independent home rule school district. . . .

Philadelphia Home Rule Charter, Adopted by the Electors April 17, 1951:

> **Section 3-404. All other officers.** Except as expressly otherwise provided in this charter, all appointed officers and all members and all officers of boards and commissions shall serve at the pleasure of the appointing power. . . .

Philadelphia Home Rule Charter, Educational Supplement Adopted by the Electors, May 18, 1965:

ARTICLE XII
PUBLIC EDUCATION

CHAPTER 1
THE HOME RULE SCHOOL DISTRICT

Section 12-100. The Home Rule School District.

A separate and independent home rule school district is hereby established and created to be known as "The School District of Philadelphia."

Section 12-101. The New District to Take Over All Assets and Assume All Liabilities of the Predecessor School District.

The home rule school district shall

(a) succeed directly the now existing school district for all purposes, including, but not limited to, receipt of all grants, gifts, appropriations, subsidies or other payments;

(b) take over from the now existing school district all assets, property, real and personal, tangible and intangible, all easements and all evidences of ownership in part or in whole, and all records, and other evidences pertaining thereto; and

(c) assume all debt and other contractual obligations of the now existing school district, any long term debt to be issued, secured and retired in the manner now provided by law.

CHAPTER 2
THE BOARD OF EDUCATION

Section 12-200. The Board Created; Its Function.

There shall be a Board of Education of the School District of Philadelphia which shall be charged with the administration, management and operation of the home rule school district.

Section 12-201. Members of the Board; Method of Selection.

There shall be nine members of the Board of Education who shall be appointed by the Mayor from lists of names submitted to him by the Educational Nominating Panel, or, if enabling legislation is enacted by the General Assembly of the Commonwealth, elected on a non-partisan basis by the qualified voters of the city, all as more fully set forth in later sections of this Chapter.

Section 12-202. Eligibility for Board Membership.

Members of the Board of Education shall be registered voters of the City. No person shall be eligible to be appointed or elected to more than two full six-year terms.

Section 12-203. Terms of Board Members.

The terms of members of the Board of Education shall begin on the first Monday in December and shall be six years except that (1) of the first members of the Board appointed and if later there be an elective Board, of the first members elected, three shall be appointed or elected for terms of two years, three for terms of four years, and

three for terms of six years, and (2) if the General Assembly enacts legislation permitting the election of members of the Board on a non-partisan basis, the terms of all appointed members shall expire on the first Monday of December immediately following the municipal election at which the first elective Board is elected.

Section 12-204. Removal of Members of the Board.

Members of the Board of Education may be removed as provided by law.

Section 12-205. Vacancies on the Board.

A vacancy in the office of member of the Board of Education shall be filled for the balance of the unexpired term in the same manner in which the member was selected who died or resigned. If a member of the Board is removed from office, the resulting vacancy shall be filled as provided by law.

Section 12-206. Educational Nominating Panel; Method of Selection.

(a) The Mayor shall appoint an Educational Nominating Panel consisting of thirteen (13) members. Members of the Panel shall be registered voters of the City and shall serve for terms of two years from the dates of their appointment.

(b) Nine members of the Educational Nominating Panel shall be the highest ranking officers of City-wide organizations or institutions which are, respectively:

(1) a labor union council or other organization of unions of workers and employes organized and operated for the benefit of such workers and employes,

(2) a council, chamber, or other organization established for the purpose of general improvement and benefit of commerce and industry,

(3) a public school parent-teachers association,

(4) a community organization of citizens established for the purpose of improvement of public education,

(5) a federation, council, or other organization of non-partisan neighborhood or community associations,

(6) a league, association, or other organization established for the purpose of improvement of human and inter-group relations,

(7) a non-partisan committee, league, council, or other organization established for the purpose of improvement of governmental, political, social, or economic conditions,

(8) a degree-granting institution of higher education whose principal educational facilities are located within Philadelphia, and

(9) a council, association, or other organization dedicated to community planning of health and welfare services or of the physical resources and environment of the City.

(c) In order to represent adequately the entire community, the four other members of the Educational Nominating Panel shall be appointed by the Mayor from the citizenry at large.

(d) In the event no organization as described in one of the clauses (1) through (9) of subsection (b) exists within the City, or in the event there is no such organization any one of whose officers is a registered voter of the City, the Mayor shall appoint the highest ranking officer who is a registered voter of the City from another organization or institution which qualifies under another clause of the subsection.

(e) A vacancy in the office of member of the Education Nominating Panel shall be filled for the balance of the unexpired term in the same manner in which the member was selected who died, resigned, or was removed.

(f) The Educational Nominating Panel shall elect its own officers and adopt rules of procedure.

Section 12-207. The Educational Nominating Panel; Duties and Procedure.

(a) The Mayor shall appoint and convene the Educational Nominating Panel (1) not later than May twenty-fifth of every odd-numbered year, and (2) whenever a vacancy occurs in the membership of the Board of Education.

(b) The Panel shall within forty (40) days submit to the Mayor three names of qualified persons for every place on the Board of Education which is to be filled. If the Mayor wishes an additional list of names, he shall so notify the Panel within twenty (20) days. Thereupon the Panel shall within thirty (30) days send to the Mayor an additional list of three qualified persons for each place to be filled. The Mayor shall within twenty (20) days make an appointment or, as provided in the following subsection, certify a nomination from either list for each place to be filled.

(c) If the General Assembly of the Commonwealth shall have previously enacted enabling legislation permitting members of the Board of Education to be elected on a non-partisan basis, not later than September fifteenth of the odd-numbered year in which the legislation was enacted or the ensuing odd-numbered year, the Mayor shall select nine names from either one or two lists of 27 names submitted by the Educational Nominating Panel according to the procedure set forth in subsection (b) and shall certify those nine names to the county board of

elections as his nominations for members of the Board of Education. In certifying the names of his nominees to the county board of elections the Mayor shall designate three of his nominees as candidates for terms of two years, three for terms of four years and three for terms of six years. The ballots or ballot labels shall not contain any party designation for any of the candidates nominated by the Mayor, and under each name there will be a space permitting the voter to write in the name of any other person. In every instance the Mayor's candidate will be elected if, but only if, he receives more votes than any other candidate whose name is written in. In every subsequent odd-numbered year, three members of the Board shall be nominated by the Mayor from names submitted to him by the Educational Nominating Panel and elected in the same manner provided by this subsection, and whenever a vacancy occurs the procedure for filling it shall be similar whether the vacancy be filled at a special election proclaimed by the Mayor or at a municipal election.

(d) The Educational Nominating Panel shall invite business, civic, professional, labor, and other organizations, as well as individuals, situated or resident within the City to submit for consideration by the Panel the names of persons qualified to serve as members of the Board of Education.

(e) Nothing herein provided shall preclude the Panel from recommending and the Mayor from appointing or nominating persons who have previously served on any board of public education other than the Board of Education created by these charter provisions.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 28 U.S.C. Section 1343(3) alleging violation of 42 U.S.C. Section 1983. Specifically, the Educational Equality League (hereinafter League, plaintiffs) alleges that the former Mayor of the City of Philadelphia discriminated on the basis of race in his appointments to the Educational Nominating Panel in May of 1971.

The method of appointing persons to the Educational Nominating Panel is established by the Educational Supplement to the Philadelphia Home Rule Charter, approved by the electors on May 18, 1965, pursuant to the Act of August 9, 1963, P. L. 643, 53 P. S. Sections 13201-13223. The constitutionality of the Charter has not been questioned.

The Charter provides that during every odd-numbered year the Mayor shall appoint and convene a panel of 13 qualified persons to be called the Educational Nominating Panel ("Panel"). The function of this panel is to nominate three persons for each vacancy on the Board of Education of the School District of Philadelphia ("Board"). From the three persons (or six persons since, if the Mayor desires an *additional* three persons for each vacancy, he merely requests additional names), the Mayor selects and appoints a person to the vacancy on the Board. The Mayor's appointments to the Board have not been challenged, nor indeed, has the quality or dedication of the actual appointees been questioned.

The qualifications for appointment to the Panel vary. Four (4) Panel members must be from the "citizenry at large" "[i]n order to represent adequately the entire community. . . ." Charter, 12-206(c).[1] The remaining

1. The Mayor can, if he chooses on his own initiative, appoint from additional organizations of his own selection to fill these four "at large" positions.

nine (9) panel members "shall be the highest ranking officers of City-wide organizations or institutions. . . ." Charter, 12-206(b). These organizations are described with particularity as:

> (1) a labor union council or other organization of unions of workers and employes organized and operated for the benefit of such workers and employes,
>
> (2) a council, chamber, or other organization established for the purpose of general improvement and benefit of commerce and industry,
>
> (3) a public school parent-teachers association,
>
> (4) a community organization of citizens established for the purpose of improvement of public education,
>
> (5) a federation, council, or other organization of non-partisan neighborhood or community associations,
>
> (6) a league, association, or other organization established for the purpose of improvement of human and inter-group relations,
>
> (7) a non-partisan committee, league, council, or other organization established for the purpose of improvement of governmental, political, social, or economic conditions,
>
> (8) a degree-granting institution of higher education whose principal educational facilities are located within Philadelphia, and
>
> (9) a council, association, or other organization dedicated to community planning of health and welfare services or of the physical resources and environment of the City.

Charter, 12-206(b) (1)-(9).

On May 25, 1971, Mayor Tate appointed and convened the Panel.

On August 6, 1971 the Educational Equality League sued Mayor Tate and the Panel alleging the Mayor made his appointments on racial criteria in violation of the Civil Rights Act of 1866, 42 U.S.C. Section 1983 and requesting a speedy hearing, an injunction against the panel from acting, a judgment declaring that the Mayor discriminated on the basis of race and an order directing the Mayor to appoint a panel "fairly representative of the racial composition of the school community." Complaint, p. 8.

After expedited pre-trial discovery was completed a hearing was held on August 25 and September 7, 1971 before the Honorable Raymond Broderick, Judge of the United States District Court for the Eastern District of Pennsylvania.

At the hearing, the Educational Equality League attempted to offer evidence to support two theories: that the Mayor directly and personally discriminated against black persons when he appointed the Panel; and that the statistical evidence demonstrating the percentage of blacks in the general population of Philadelphia and the percentage of black students in the population of the School District of Philadelphia as compared with the percentage of blacks appointed to the thirteen member Panel created a presumption of discrimination by the Mayor.

The Mayor and Panel offered evidence to support several theories of defense: that the appointments of the Mayor are protected from judicial interference by virtue of the executive's inherent discretion and the constitutionally mandated doctrine of separation of powers; that the Mayor's appointments satisfied the qualifications required by the Charter; that the qualifications required by the Charter vitiated the applicability of the Educational Equality League's statistical theory since more than mere citizenship and residency are required by the Charter to qualify for appointment to the Panel; and that the statistical theory is invalid as applied to the Panel since the Panel is so small that each individual change on the Panel results

in extremely large changes in percentages. Finally, evidence established that the Mayor personally championed the expansion of opportunity for blacks in City employment as well as in appointed and elective political positions and evidence was offered to contradict any assertion of personal discrimination as to the Mayor.

On November 8, 1973, the District Court issued its Findings of Facts, Conclusions of Law and Order, dismissing the complaint with prejudice. 333 F. Supp. 1202.

The District Court found inapplicable the "percentage rationale," i.e., the Educational Equality League's theory that a prima facie case or presumption of discrimination can be proved by comparing the percentage of blacks in the population of the City of Philadelphia with the percentage of blacks appointed to the 1971 Panel. 333 F. Supp. at 1207.

The District Court discussed but refused to find that the Mayor had discriminated on the basis of race in his appointments to the 1971 Panel.

The District Court did not reach the questions of executive discretion and separation of powers, although it expressed doubts as to its power to interfere with the discretion of an elected executive in his discretionary appointments. 333 F. Supp. at 1206.

The District Court did not reach or discuss the inapplicability of the percentage rationale in relation to the qualifications required by the Charter beyond citizenship and residency.

On November 9, 1971, the Educational Equality League filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit.

On December 5, 1972 argument on the briefs was heard by Judges Van Dusen, Gibbons and Hunter.

On January 11, 1973 the Court of Appeals issued its judgment vacating the judgment of the District Court except as to the Educational Nominating Panel, and re-

manding the cause to the District Court for further proceedings.

Timely Petitions for Rehearing were filed by each party, and a Petition for Rehearing En Banc was filed by the Mayor of the City of Philadelphia. All were denied, the Educational Equality League's on February 21, 1973 and the Mayor's on February 22, 1973.

On February 21, 1973 the Court of Appeals entered an order amending its order of January 11, 1973. The Court of Appeals found as a fact that the appointments by the Mayor to the Panel were not within the executive's discretion and that the selection process had a discriminatory effect. The Court of Appeals applied the percentage rationale holding that demonstrating under-representation and an opportunity for discrimination is all that is necessary to establish a prima facie case. Finally, the Court of Appeals found as a fact that the *former* Mayor had discriminated on the basis of race in his selections to the Panel and based on this finding, required the *present* Mayor to submit the bases for his executive judgments to the scrutiny of the District Court on remand.

These findings by the Court of Appeals were directly contrary to those made by the District Court. Furthermore, it failed to consider the evidence adduced that directly contradicted the witness relied upon by the Court of Appeals, and the evidence establishing that Mayor Tate had personally opened areas of opportunity to minorities that had previously been denied them.

The Mayor of the City of Philadelphia and the Educational Nominating Panel moved the Court of Appeals for a Stay of its Mandate pending Petition to the Supreme Court for a Writ of Certiorari. The Court of Appeals ordered its mandate stayed for 15 days with "no further extension. . . ." Order of United States Court of Appeals, March 2, 1973.

The Petition for a Writ of Certiorari was filed on March 16, 1973, and the Petition was granted on May 7, 1973.

SUMMARY OF ARGUMENT

I. The Constitutional Doctrine of Separation of Powers, as interpreted by this Court, precludes judicial interference in areas involving the discretionary powers of the Executive Branch of government. *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). This Court traditionnally has been particularly reluctant to permit interference, either by the Courts or by Congress, with the executive's discretionary appointment power. U.S. Const., Art. II, Sec. II, Cl. II; *Myers v. United States*, 272 U.S. 1, 71 L.Ed. 160 (1926); *Kiem v. United States*, 177 U.S. 290, 44 L.Ed. 744 (1900). The law of the Commonwealth of Pennsylvania is similar in that encroachments upon the executive's appointment power by the other co-equal branches of government will not be permitted. *Harding v. Pinchot*, 306 Pa. 139, 159 A. 16 (1932). In ordering the present Mayor to subject his discretionary appointments to judicial scrutiny, the Circuit Court entered into an area closed to it by the Constitution, this Court, and the discretionary doctrine of judicial self-restraint.

II. The Circuit Court was in error in reversing the District Court's finding that plaintiff's statistical evidence was meaningless. In accepting the statistical evidence of plaintiffs, admittedly with no evidence of its significance, the Circuit Court ignored its own decision (en banc) with regard to the burden of proving a statistical theory of discrimination. *Commonwealth of Pennsylvania v. O'Neill*, 473 F.2d 1029 (1973). On a statistical basis, plaintiffs' evidence is meaningless since only the four at-large seats on the Panel lend themselves to plaintiffs' random and independent selection analysis; and, even if it be assumed that all

thirteen seats could be analyzed in that manner, the sample is still too small for significant conclusions to be drawn. It is also impossible to provide for proportionate racial representation or freedom from underrepresentation on a Panel of only thirteen members without necessarily ignoring the rights of Philadelphia's numerically small minority groups. *Hernandez v. Texas*, 347 U.S. 475, 98 L.Ed. 866 (1954); *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880); *Hughes v. Superior Court* of California, 339 U.S. 460, 94 L.Ed. 985 (1949).

III. Rule 52 (a) of the Federal Rules of Civil Procedure limits reversals of findings of fact of the District Court to those findings which are found to be "clearly erroneous" by the Circuit Court. The fact that there might be some evidence favorable to the appealing party is not grounds for reversal. *United States v. Yellow Cab Company*, 338 U.S. 338, 94 L.Ed. 150 (1949). Here the Circuit Court's reversal was based upon irrelevant hearsay within hearsay testimony and upon its own misconstruction of one of the District Court's findings of fact. The record in the District Court discloses an ever-increasing number of black persons employed at all levels of government service over the decade of former Mayor Tate's administration. The evidence of Tate's non-discriminatory public service was overwhelming; the evidence to the contrary was unsubstantial, if existant.

IV. The Circuit Court used an inappropriate standard in determining that plaintiffs had established a prima facie case of discrimination, and misconstrued the extent of plaintiffs' federally protected rights. There is no constitutional right to appointment to public office; and since there is

no evidence to indicate that plaintiffs were unconstitutionally denied consideration for public office, the Circuit Court erred in finding that plaintiffs had established a prima facie case of violation of a federally protected right. *Carter v. Greene County*, 396 U.S. 320, 24 L.Ed. 2d 549 (1970); *Turner v. Fouche*, 396 U.S. 346, 324 L.Ed. 2d 597 (1970).

V. This action was filed against former Mayor James H. J. Tate alleging discrimination in his personal discretionary appointments to the Educational Nominating Panel. Without any evidence of record with regard to present Mayor Frank L. Rizzo (he had not yet been elected at the time of trial) and based upon an unsubstantiated, unwarranted and incorrect assumption of the duties of Deputy to the Mayor Anthony P. Zecca (retained by Rizzo after having served under Tate), the Circuit Court directed the District Court to review the discretionary appointments of Mayor Rizzo. This prospective application of injunctive relief against a non-party, admittedly without a shred of evidence supporting it, is a clear abuse of the Circuit Court's power and discretion. *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 89 L.Ed. 667 (1944); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 6 L.Ed. 2d 551 (1961).

ARGUMENT

I. The Constitutional Doctrine of Separation of Powers and the Doctrine of Judicial Self-Restraint Preclude Judicial Intervention into the Discretionary Powers of the Executive Branch of Government.

This case involves the exercise of the appointment power of the Mayor as authorized by the Educational Supplement to Philadelphia's Home Rule Charter. The decision of the Circuit Court to subject the Mayor's appointment to judicial scrutiny amounts to a serious encroachment by the judiciary on the executive's powers and violates the constitutional mandate that each branch of government be free to act in its respective domain.

The gravity of the violence done by the Circuit Court to our basic concepts of constitutional government is best exhibited by analogizing to the Federal Judiciary. Assuming a disproportionately small percentage of black judges in the Federal Judiciary as compared to their proportion of the national population, the law as interpreted by the Circuit Court in this case would require the President of the United States to substantiate his nondiscrimination in his judicial appointments and further substantiate his proper consideration of blacks in making those appointments. It would also inferentially require that all future appointees be black until such time as the percentage of black judges equals the percentage of blacks in the general population.

Perhaps a more pointed analogy can be made to the recent appointments to this Honorable Court. While recent vacancies existed in this Court, much was made in the Nation's press of the fact that there had never been a woman Justice of the Supreme Court. The names of several outstanding female lawyers and jurists were bandied about as potential appointees. A woman was not appointed. The logic of the Circuit Court would require the President to prove that he was not guilty of sex discrimination in appointing Mr. Justice Powell and Mr. Justice Rehnquist to this Court.

The Federal Constitution divides our national government into three separate and independent branches—the Legislative, the Executive and the Judicial. In commenting on this constitutional blueprint, James Madison stated to the First Congress:

> If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers.

1 Annals of Congress 581.

The Separation of Powers Doctrine provides that each branch, in the exercise of its granted powers, be free from limitations or interference from the other branches, unless such encroachments are provided for in the Constitution. With regard to the appointment power of the Federal executive branch the United States Constitution, Art. II, Section II grants to the President the power of appointment of all officers of the United States whose appointment is not otherwise provided for. This appointment power is generally subject to the advice and consent of the Senate:

> [B]ut the Congress may by Law vest the appointment of such inferior officers, as they think proper in the President alone . . .

In his landmark decision is *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), Mr. Chief Justice Marshall held that the judiciary did not have the power to interfere with the prerogatives of the executive branch of the government.

The facts of *Marbury* are so well known that they need only be summarized here. William Marbury was an appointee of the outgoing President, John Adams, and, while his appointment had been made, it was not delivered by the new Secretary of State, James Madison. Marbury sought an order in mandamus commanding the Secretary of State to deliver the appointment. In discussing the propriety of the remedy, the Court said at page 169:

> The intimate political relation subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation.

And more importantly at page 170-171:

> Where the head of a department acts in a case in which executive discretion is to be exercised; . . . it is again repeated, that any application to a Court to control, in any respect, his conduct would be rejected without hesitation.

The first paragraph quoted above, speaks of the basis for the doctrine of judicial restraint in political questions. The second paragraph states a principal of law which denied to the judiciary the power to interfere in areas of executive discretion.

Marbury v. Madison is analogous to the case at bar. Although the discretion of the President might be considered to be far greater than that of the Mayor of Philadelphia, the difference is one of quantity rather than quality, for the prerogatives of the executive branch in a tripartite form of government are constant, and any court, as part of the judiciary, must refrain from interfering with these prerogatives.

Applied to the present litigation, *Marbury* stands for the proposition that legal appointments within the discretion of the Mayor may not be disturbed. Although the Complaint in the instant action does not directly ask for mandamus, the relief demanded was that the present Panel be dissolved and new appointments be made. These new appointments, the League demands, must more adequately represent the black population of the City. This so-called adequate representation can only be achieved by increasing the number of blacks on the panel. The demand is,

therefore, that the Mayor abandon his judgment and discretion and perform the purely executive function of appointing in an atuomatic, ministerial way—that is, choose anyone, so long as he is black.[2]

The Circuit Court chose to allow the 1971 Panel to die a natural death, but accepted the League's under-representation argument and directed the District Court to examine the new Mayor's appointments to the 1973 Panel for the presence or lack of discrimination in those appointments. This or any similar limitation or restraint on the powers of the Chief Executive of the City is thoroughly impermissible, and the Circuit Court erred in directing such an invasion of the executive discretion.

An exhaustive analysis of the doctrine of separation of powers is contained in Mr. Chief Justice Taft's Opinion for this Court in the case of *Myers v. United States*, 272 U.S. 1, 71 L.Ed. 160 (1926). The issue involved concerned Congressional encroachment on the appointment and removal power of the President. This Court held that the Tenure of Office Act of 1867 was unconstitutional insofar as it attempted to prevent the President from removing executive officers appointed by him with the advise and consent of the Senate.

In the case of *Bailey v. Richardson*, 182 F. 2d 46 (D.C. Cir., 1950) *affirmed* 341 U.S. 918, 95 L.Ed. 1352 (1951), Judge Prettyman stated at page 62:

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2. Apparently the underlying logic for plaintiffs' case is that only a member of a given racial or ethnic group can adequately represent the interests of that racial or ethnic group on any governmental board or commission (N.T. 24-6, Appendix 46a-48a). Aside from being patently ridiculous on its face, this contention was contradicted by plaintiff W. Wilson Goode and plaintiffs' witness Alvin E. Echols. Goode was critical of black Panel-member Freeman Hankins (N.T. 17, Appendix, 42a) and some black members of the School Board (N.T. 28, Appendix, 49a). Echols testified that the "WASPS" are "a great friend of Black people." (N.T. 101). It would seem therefore that some whites better represent the black community than some blacks.

> The judiciary cannot assume responsibility for the sufficiency of the qualifications of the executive employees without assuming corresponding responsibilities for the conduct of executive affairs. It has no such power. The courts cannot hold as a rule of law that grounds for disqualification of subordinate executive employees reasonable in the mind of the executive must also be reasonable in the mind of the courts. It is inescapable from the Constitution's separation of powers that the qualification and disqualification of executive employees is for executive determination; . . ."

The case of *Ex Parte Hennen*, 13 Pet. 230, 10 L.Ed. 138 (1839) involved the removal of a District Court clerk by the district court judge who was vested by Congress with the power to appoint the clerk. This Court stated that it was without power to afford redress to the discharged clerk; that is, the exclusive power to appoint was vested in the district judge's discretion, and this Court could not intervene. It is submitted that where this Court refuses to interject itself into matters of the exercise of discretion on the part of the lower officials within its own branch of government, there is all the more reason in light of the Constitutional mandate of separation of powers to refuse to intervene in the exercise of the discretion of the other branches of government.

Furthermore the concept of separation of powers is also basic to Pennsylvania government. *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 51, 274 A. 2d 193 (1971); *Hayes v. City of Scranton*, 354 Pa. 477, 47 A. 2d 798 (1946); *Wilson v. Philadelphia School District*, 328 Pa. 225, 195 A. 90 (1937). In the words of the Pennsylvania Supreme Court in the *Dauphin County Grand Jury Investigation Proceedings (No. 1)*, 332 Pa. 289, 295, 2 A. 2d 783 (1938):

> . . . [I]t is basic and fundamental in our system of government that the powers of the three coordinated branches of government are and should be separate

> and kept clear, the one from the other. The Judicial Branch cannot assume overlordship of the Executive or Legislative, or vice versa.

Thus, the Pennsylvania Supreme Court has consistently refused to interfere with the Executive's power of appointment.

The Circuit Court held that since the Panel was not part of the Mayor's personal staff, the use of executive discretion was not pertinent to proper consideration of the appeal.

> . . . [D]efendants reason that a member of the executive must have considerable discretion in the choice of his personal staff and that the Fourteenth Amendment should not be interpreted to restrain the exercise of this discretion. It is unnecessary for this court to decide whether the Fourteenth Amendment is limited in this way, because it is clear from the language of the Educational Supplement and from the legislative history quoted earlier that the Panel was not intended to operate as part of the staff of the Mayor.

(Appendix to Pet. for Cert. p. 46).

In so holding, the Circuit Court considered its own version of defendants' argument. The defendants do not limit executive discretion in appointment to "considerable" discretion; the discretion is as absolute as the enabling authority allows. The defendants do not limit executive discretion in appointment to the executive's "personal staff", for the discretion is as extensive as the enabling authority allows. In limiting the extent of the executive power of appointment to "considerable discretion in the choice of his personal staff", the Circuit Court improperly invaded the executive's discretion and ignored decisions of this Court and of the Supreme Court of Pennsylvania.

In *Keim v. United States*, 177 U.S. 290, 44 L. Ed. 744 (1900), this Court, considering the dismissal of a mere clerk from the Department of the Interior, held at page 293:

> The appointment to an official position in government, *even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment.* The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore, *it is one of those acts over which the Courts have no general supervising power.* [emphasis ours]

See also *Parsons v. United States*, 167 U.S. 324, 42 L. Ed. 185 (1897).

A similar decision was reached by the Pennsylvania Supreme Court in the case of *Harding v. Pinchot*, 306 Pa. 139, 159 A.16 (1932). Pennsylvania law vested in the governor the power to appoint notaries public throughout the Commonwealth.[3] Plaintiff had been a notary public for twenty-four years, receiving successive appointments from six governors. Governor Gifford Pinchot refused to reappoint the plaintiff in 1931. In reviewing the extent of the governor's power of appointment in this case, the Pennsylvania Supreme Court held:

> These two acts empower the governor to judge the number and personality of those appointed by him to be notaries in the state. Inasmuch as these appointments are *entirely subject to his discretion, he may refuse to appoint for reasons best known to himself or for no reason*, and what is true of original appointments is applicable to reappointments. [emphasis ours].

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3. The Act of March 5, 1791, 3 Smith's Laws, 6, §2; The Act of February 19, 1873, P. L. 36.

Section 12-206 of the Educational Supplement vests the Mayor with the power to appoint members of the Educational Nominating Panel subject only to the unchallenged qualifications for service embodied in that section. In ordering the District Court to review and pass judgment upon the new Mayor's discretionary appointments to the 1973 Panel, the Circuit Court invaded an area closed to it by this Court.

The decision of the Circuit Court to subject discretionary appointments of the Mayor to judicial scrutiny also violates fundamental concepts of judicial self-restraint in the issuance of mandatory injunctive relief. It is a well-settled principle of law that, although a court can tell the executive to exercise his discretion or to perform a ministerial duty, a court is powerless to substitute its judgment for that of the executive or to otherwise interfere with the exercise of the executive's discretion. *Panama Canal Co. v. Grace Lines, Inc.*, 356 U.S. 309, 2 L. Ed. 2d 788 (1958); *Wilbur v. United States, ex rel. Kadrie*, 381 U.S. 206, 74 L. Ed. 809 (1930); *Marbury v. Madison*, 1 Cranch 137.

In commenting on this principle of judicial self-restraint, Judge Kalodner of the Third Circuit Court stated in the case of *Huntt v. Government of Virgin Islands*, 382 F. 2d 38, 45 (1967):

> This self-imposed limitation on judicial power stems from the doctrine of separation of powers; Courts cannot invade the jurisdiction of other departments of government in matters of policy, and for a Court to substitute its judgment of discretion for that of a member of the executive branch of government would amount to such an invasion.

Thus in *Huntt*, the Third Circuit Court refused to interfere with the discretionary judgment of the Territorial Government of the Virgin Islands.

Finally, the essence of the elective process is that the electors give their authorization to a person to exercise his

discretion, be that person elected to executive, legislative or judicial office. As Chief Justice Marshall held in *Marbury v. Madison, supra* at page 166:

> The conclusion from this reasoning is, that where the heads of departments are political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, *nothing can be more perfectly clear than that their acts are only politically examinable.* [emphasis ours]

It is for the voters of Philadelphia (29% black) and not the Circuit or District Court to pass judgment upon the Mayor's exercise of the discretion inherent in his office.

Thus it is submitted that the decision of the Circuit Court violates the constitutional mandate of separation of powers, ignores any considerations of judicial self-restraint and corrupts the elective process which is at the very basis of our governmental philosophy.

II. The Circuit Court violated Rule 52(a) of the Federal Rules of Civil Procedure in Reversing the District Court's finding that the statistical evidence proffered by plaintiffs was meaningless as an indicator of racial discrimination.

The League has argued to both the District Court and to the Circuit Court that they had established a prima facie case of discrimination by means of their evidence of statistical data indicating a disparity in the percentage of black persons on the Panel relative to the percentage of blacks in Philadelphia's population and/or relative to the percentage of blacks attending Philadelphia's public schools. The District Court rejected this argument, finding the League's statistics to be meaningless as an indicator of racial dis-

crimination (Appendix to Pet. for Cert., p. 35). The Circuit Court reversed the District Court on this point, finding that the League's statistics were "significant" (Appendix to Pet. for Cert., p. 47).

There was and is no legal, logical nor mathematical basis for the Circuit Court's acceptance of the League's statistical evidence. In accepting the statistical evidence offered by the League, the Circuit Court ignored its own decisions with regard to the probative value of statistical evidence and made an independent finding of fact without a finding of clear error by the District Court.

The Circuit Court prefaced its findings of the significance of the League's statistics by stating that:

> "Unfortunately, the parties did not introduce the expert testimony of a statistician on whether the frequency of black appointments to the 13-member Panel fell outside the range to be expected were race not a factor."

In effect, the Circuit Court correctly stated that there was no evidence of the statistical significance of the League's data. Notwithstanding this caveat, the Circuit Court found that the League's statistics were significant. This finding is clearly in opposition to the decision of the Third Circuit Court in the case of *Commonwealth of Pennsylvania v. O'Neill*, 473 F.2d 1029 (1973).

In the *O'Neill* case, the District Court (E.D. Pa.) found that the statistical evidence introduced by plaintiffs established a prima facie case of discrimination in both the hiring and promotional procedures of the Philadelphia Police Department. 348 F. Supp. 1084 (1972). In support of their allegations of discrimination in the Police Department's promotional procedures, plaintiffs introduced data purportedly showing racial discrimination in those procedures. In ruling on the promotional aspect of the case, the District Judge stated that:

> There is no evidence as to the statistical significance of these figures nor as to the passing rates for other promotional examinations.

348 F. Supp. 1084, 1101. Nevertheless, the District Court found that a prima facie case of discrimination in promotions had been established.

On appeal, a Panel of the Third Circuit Court reversed the District Court on this point because of the lack of evidence of the statistical significance of the data relied upon by the District Court. On rehearing en banc the Third Circuit Court (Judge Van Dusen not participating) unanimously arrived at the same holding, pointing out that:

> Thus, although he [District Court Judge] made a finding that the promotional tests disqualify a disproportionate number of black policemen seeking promotion, the Judge pointed to the absence of the statistical significance of the data on which his finding was based.

473 F. 2d 1029, 1031.

Thus, the Third Circuit Court's decision in *O'Neill* requires that a plaintiff attempting to establish a prima facie case of discrimination through statistical evidence do more than merely inundate the trial court with numbers and percentages. Such a plaintiff has the burden of establishing that his numbers have meaning, that they are statistically significant.

Ironically, in the instant case, the Circuit Court has in part reversed the District Court because the District Court viewed the statistical evidence in accordance with the subsequent decision of the Circuit Court in *Commonwealth v. O'Neill*. Furthermore, in ignoring the lack of evidence of statistical significance and ruling as if the statistics had been proven significant, the Circuit Court did precisely what is unanimously held should not be done.

Notwithstanding the fact that the League never met its burden of proof in presenting its statistical evidence, the League's statistics, even in a mathematical vacuum, are meaningless in themselves; and the League's analysis of its statistics is, as found by the District Court, meaningless as an indicator of racial discrimination.

In making their analysis, the League necessarily assumed that the entire 13-member Panel lent itself to a simple random and independent sampling analysis which merely compared the percentage of blacks on the Panel to the percentage of blacks in the City and in the City's public schools. The conclusion they sought, accepted by the Circuit Court, was that the percentage disparity is greater than could be expected if the selection process were random and independent or, in the words of the Circuit Court, "colorblind." (Appendix to Pet. for Cert., p. 47). However, since 9 of the 13 seats on the Panel are appointed according to the unchallenged scheme set out in the Educational Supplement, only the 4-at-large seats appointed from the general public can be legitimately subjected to a random and independent sampling analysis. Appointments to the other 9 seats can not be properly examined using a random and independent sampling analysis absent evidence of the percentage of blacks in each of the 9 categories enumerated in the Educational Supplement. The League offered no such evidence.

Fundamentally, the problem of attaining statistical significance is one of obtaining a sufficiently high degree of confidence in the results obtained from analysis of a sample to justify a statistical conclusion about the whole. In layman's terms, the League's statistical argument and analysis can be perceived by visualizing a huge fish bowl containing one million marbles (representing the approximate adult population of Philadelphia), 666,667 being white marbles, 333,333 being black marbles (representing the approximate racial percentages in Philadelphia). Thus, if a person were to pick one marble out of the bowl, there is a

66⅔% probability that the marble will be white, and a corresponding 33⅓% chance that the marble will be black.

Plaintiffs' statistical analysis is that in selecting the Panel, the Mayor picks 13 marbles out of the fish bowl, each selection being completely at random and independent of other selections. Plaintiffs' argument is that if at least 4 of the 13 marbles (31%) are not black, then racial discrimination has been proven. It is an error-fraught statistical technique to attempt to ascribe statistical significance to percentage figures based on a minute numerical sample.[4] Here, plaintiffs' attempt to parlay racial percentages on a 13-member Panel into a significant conclusion about selection of the Panel. Their sample is simply too small. Therefore, even if it is assumed arguendo that a random and independent selection analysis is applicable to the entire 13-member Panel, the League's statistics still prove nothing.

There is also no logical basis for the decision of the Circuit Court to accept the League's statistical evidence since the Panel itself is too small to permit inferences to be drawn about proportionate representation. It is true that the plaintiffs have continually maintained that they have no constitutional right to any particular percentage on the Panel (N.T. 26, Appendix 48a); yet, the essence of their claim has been deviation from what they feel their proportionate representation should be. Therefore, proportionate representation on the Panel, and the League's indirect attempt to secure it by styling their argument as one for freedom from statistical under-representation, is a vital issue in this case.

The Circuit Court compared the proportion of blacks on the Panel with the racial composition of the public schools (the propriety of this comparison discussed infra, p. 35) and concluded that a prima facie case of discrimi-

4. The problem of placing confidence in obtained statistical results is treated in Hays, William L., *Statistics for Psychologists*, 287-296 (1963), and Guilford, Joy P., *Fundamental Statistics in Psychology and Education*, 214-224 (4th Ed., 1965).

nation had been established. In light of the myriad racial, ethnic and national groups represented among the approximately 2,000,000 people in Philadelphia, it is incredible that the Circuit Court would make a comparison based on proportionate racial representation on a Panel of only 13 members. Whether the proposition of the League and the Circuit Court is that blacks are entitled to statistically proportionate representation or freedom from statistical under-representation, that proposition must apply to all ethnic and national groups with equal force and effect. *Hernandez v. Texas*, 347 U.S. 475, 98 L. Ed. 866 (1954); *Strauder v. West Virginia*, 100 U.S. 303, 308, 25 L. Ed. 664 (1880). However, it is clearly impossible to provide for either proportionate representation or freedom from statistical under-representation on a Panel of only 13 members, even if it be conceded that the Panel should be representative of the City's population from a racial and ethnic viewpoint.

Philadelphia's Puerto Rican community comprises less than 0.5% of Philadelphia's population. Under a theory of proportionate representation, Puerto Ricans would be entitled to only 13/100 of a seat on the Panel.[5] They would be statistically unable to advance a theory of statistical under-representation in their behalf. The same situa-

5. It is interesting to note that plaintiffs' witness, Alvin E. Echols, Jr., feels that "it is absolutely outrageous that our Puerto Rican community has no representation, none, on the Board of Education." (N.T. 100). Under plaintiffs' percentage rationale, of course, Puerto Ricans could not be represented without causing the under-representation of a numerically more deserving group.

Furthermore, plaintiff Wilson Goode testified:

> Certainly, I think that it [Panel or Board] involves the Puerto Ricans and other foreigners. I think that the views of the Jewish community ought to be reflected, I think all views of other groups ought to be reflected, and I think that those desires and aspirations ought to be in some way reflected. (N.T. 25, Appendix 48a).

Mr. Goode did not suggest how a Panel with only 13 members could be such an all-encompassing racial and ethnic mirror.

tion would prevail for the Chinese and American Indian communities, among others, included in Philadelphia's population. Thus, the legal and statistical theories of the League and the Circuit Court, create the very real danger of freezing out persons who are members of numerical minorities from participation on governmental boards and commissions because of the numerical paucity of their particular ethnic group.

It was this very danger of creating superior rights for large minority groups, with regard to employment, that caused this Court to consider the constitutionality of holding picketers in contempt for violating an anti-picketing injunction, where the picketing sought to force a company to hire according to a racial quota. *Hughes v. Superior Court of California*, 339 U.S. 460, 94 L. Ed. 985 (1949). In affirming the contempt citations, Mr. Justice Frankfurter, speaking for the Court, stated at page 464:

> These considerations are most pertinent in regard to a population made up of so many diverse groups as ours. To deny California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of the Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of social and religious concentrations in various cities.

Where there are large numbers of persons regularly being hired or selected, a pattern of acceptance or rejection of any independently identifiable class will appear in the membership of a work force or a jury venire. Thus, if a hiring agent denied blacks employment in a large business in an area with a general population whose labor force contained a substantial proportion of blacks, the dispro-

portionate absence of blacks among the employees could be significant. Likewise, if jury lists contain very few blacks, and the general population contains many blacks, a statistical inference can be drawn. However, the smaller the size of the employing business, the smaller the size of the jury list in question, the less validity the statistical inference has. Thus, a 500 member group of which 15% are black in a general population of 33% has more statistical significance supporting the proposition that a disparity may indicate discrimination than a 13-member panel with 15% blacks and a general population of 33%.

Thus the District Court was correct in its statistical analysis when it found:

> With only thirteen members on the Educational Nominating Panel, the addition or subtraction of one member of any ethnic or racial group results in a change of eight (8) per cent in that group's representation. In this Court's opinion, such wide fluctuations based on small numerical changes in membership on the Panel result from the limited size of the Panel and render such statistics meaningless as an indicator of racial discrimination. Furthermore, in the cases wherein the percentage rational has been adopted, there were a large number of blacks within the population eligible for a large number of positions. This is not the situation in the instant case where a small board is involved, and we can not find that the absence of additional blacks from a thirteen-member panel proves discrimination.

(Appendix to Pet. for Cert., p. 35)

Another level of response to the statistical presumption is on the qualitative level. Not only are the statistics insignificant and meaningless, but the nature of a political appointment to a specialized panel is so different from registration of a voter, the selection of a juror for member-

ship on a jury panel, or the hiring of an employee in a work force, as to make them totally incomparable.

Selection for membership on a jury panel is practically a right of citizenship and does not involve *any* executive discretion whatsoever. The right to vote is one that has been carefully guarded. The right to nondiscrimination in hiring has developed to where the courts have specified duties in the employer to refrain from activities which discriminate or cause a discriminatory impact in the hiring of any independently identifiable class without a rational, job-related basis. *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L. Ed. 2d 158 (1971). However, a political appointment or appointment to a governmental policy position is a vastly different situation. As has been heretofore developed, there is no right to public appointment. The executive has the right to appoint persons in whom he can place his confidence and trust in order to fulfill the duties for which he must bear the ultimate responsibility in the political arena. To restrain him from carrying out his duties by limiting his discretion is tantamount to removing the qualities for which he was originally elected. It is the discretion of the Mayor for which the electors vote. Therefore, assuming arguendo the statistical significance of the League's percentages, such evidence would not be probative of or create a presumption of racial discrimination in a case involving a political appointment to office.

Finally the Circuit Court accepted the League's statistical analysis by inventing a new qualification for membership on the Panel. The Court took note of the fact that the student body of the City's public schools are approximately 60 percent black and concluded:

> "Because one qualification for Panel membership is interest in the public school system, and because the parents of school children are likely to have this interest, a colorblind method of selection might be expected to produce that many black Panel members."

(Appendix to Pet. for Cert. p. 47).

An examination of Section 12-206, of the Educational Supplement reveals no qualification resembling "interest in the public school system."

Aside from the plethora of statistical errors made by the Circuit Court in making its facutal finding of discrimination, the Circuit Court combined legal error with statistical error in comparing the percentage of blacks on the Panel to the percentage of blacks in the school system. The District Court was correct in holding that:

> "The standard when using a percentage rationale to establish a prima facie case of discrimination has always been the number of Blacks qualified to fill the jobs in which the alleged discrimination is taking place. [Citing Cases]. In the instant case that figure would depend on the *adult population* of Philadelphia which is approximately 33%. [Emphasis by the Court]"

(Appendix to Petition for Cert., p. 35).

If the Educational Supplement itself were under constitutional attack as discriminatory against blacks, the racial composition of the public schools conceivably could be relevant. The League has not made that attack. It therefore is no more relevant to the issues presented in this case that the school system is 60% black than it is that the school system is almost 100% under the age of 18. Neither consideration is in any way related to the makeup of the Panel as set out in the Educational Supplement.

Therefore it is respectfully submitted that the Circuit Court was in error in giving credence to and accepting the League's statistical evidence as an indicator of racial discrimination, and it is further submitted that the District Court was correct in its statistical and legal analysis of the League's evidence, and was correct in holding that the evidence was meaningless as an indicator of racial discrimination.

III. The Circuit Court violated rule 52(a) of the Federal Rules of Civil Procedure in reversing the finding of the District Court and independently finding intentional racial discrimination on the part of former Mayor James H. J. Tate.

The Circuit Court found that the League had established a case of direct discrimination. In making this finding the Court relied on a portion of the testimony of plaintiff, W. Wilson Goode, and its own misstatement of a finding of fact of the District Court. Mr. Goode testified that:

> At that time [1969] the Mayor [Tate] made a public statement that he was not going to appoint any more Negroes to the Board [of Education] because, in his feeling, they had adequate representation and that he was going to appoint someone from the nominees to the Board of Education.

(N.T. 16, Appendix 41a).

The Circuit Court found that this testimony was given "without contradiction or objection", and that the District Court had overlooked it.

This testimony was neither uncontradicted by the City nor was it overlooked by the District Court since Deputy to the Mayor Zecca both contradicted Goode's testimony and exposed it as heresay twice removed. Zecca testified:

> Question. Mr. Zecca, we were discussing earlier a statement by Mayor Tate in 1969 that he would not appoint any additional Negroes to the School Board and you said you didn't recall that statement.
>
> Answer. I said I don't think he made such a statement.
>
> Question. Well all right.
> May I show you a very bad copy of the page of the Philadelphia Inquirer, Saturday, May 3, 1969, and the articles says, "he indicated", referring to the Mayor,

"he would not appoint another Negro to the Board because the Negro community has good representation in the two Negroes now serving on the Board."

Do you recall that article?

Answer. The witness: "I don't recall the article specifically but it doesn't say he not going to name another member. It said he indicated that he wouldn't name another member; and this is, of course, the reporter's version of this, but the quote said the Negro community has good representation in the two Negroes now serving on the Board.

They may have asked him whether he was going to appoint any more Negroes to the Board and he said the Negro community has good representation on the Board as it is; just like it has excellent representation right in this story."

(N.T. 259-261, Appendix 91a-93a).

Thus the Circuit Court accepted Mr. Goode's interpretation of a reporter's interpretation of an alleged comment by then Mayor Tate.[6] The District Court properly held that the newspaper article was inadmissable hearsay. (Appendix to Pet. for Cert. p. 36).

Secondly, Mr. Goode testified to the intention of the Mayor. As this Court said in *United States v. Yellow Cab Company*, 388 U.S. 388, 341-342, 94 L. Ed. 150 (1949):

> Finding as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. . . . The Trial Court listened to and observed the of-

6. The proposed Rules of Evidence for the United States Courts and Magistrates, Rule 805, provide that "hearsay within hearsay is not excluded under the "hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule provided in these rules." Neither part of Mr. Goode's utterance conforms with an exception to the hearsay rules.

> ficers who had made the records from which the government would draw an inference of guilt and concluded that they bear a different meaning from that for which the government contends.
>
> It ought to be unnecessary to say that Rule 52 applies to appeals by the government as well as those by other litigants. There is no exception which permits it, even in an anti-trust case, to come to this Court for what virtually amounts to a trial de novo on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court had decided to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not "clearly erroneous."

Furthermore, Mr. Goode and the newspaper article were referring to the Mayor's intention to appoint persons to the Board of Education in 1969 and not to the Educational Nominating Panel in 1971. The League has made no challenge whatsoever to the appointments to the Board, but has limited this suit to challenging appointments made to the Panel in 1971. Notwithstanding the dichotomy of both the time and the subject matter of Mr. Goode's contradicted, heresay testimony, the Circuit Court accepted it and found that "an inference may be drawn that the Mayor in similar manner excluded blacks from consideration as members of the 1971 Panel" (Appendix to Pet. for Cert., p. 43, n. 9). Then, compounding the error of prospective application of non-germaine heresay within heresay testimony, the Circuit Court directed the District Court to fashion prospective relief which purports to bind the personal appointments of the new Mayor who is not and never has been a party to this ac-

tion. (The legal propriety of such relief discussed in Argument V).

In making its findings of direct discrimination, the Circuit Court also relied upon its own erroneous interpretation of a finding of fact of the District Court. The Circuit Court stated that:

> The district court found that Deputy Mayor Zecca was unaware of the existance of black-oriented organizations which were within the requirements of sections 12-206 (b).

(Appendix to Pet. for Cert, p. 43) (The question of the compatibility of "black orientation" and the Educational Supplement discussed infra, p. 41).

The District Court actually stated in Finding of Fact No. 17 that:

> The person assigned by the Mayor of Philadelphia to chose the groups under the enumerated categories, Deputy Mayor Anthony Zecca, at the time of the hearing in the instant case was unaware of the existence of *many* of the black organizations. [Emphasis ours]

(Appendix to Pet. for Cert., p. 32).

The action of the Circuit Court with regard to the findings of the District Court constitute a perfect example of the reasons for the existence of Rule 52(a) of the Federal Rules of Civil Procedure. Rule 52(a) provides in pertinent part:

> In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . . Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given

> to the opportunity of the trial court to judge of the credibility of the witnesses. . . .

The Circuit Court based its setting aside of the District Court's Findings of Fact on admittedly unproven statistics; on contradicted, inadmissible hearsay of a declarant's interpretation of a third person's intent, and a misconstruction of one of the District Court's Findings of Fact. Even in a close case, where evidence on any given point has been presented by both sides, and the finding of the Trial Court could conceivably be in favor of either party; a Circuit Court cannot set aside the findings made unless they are "clearly erroneous". *United States v. Yellow Cab Co.*, 388 U.S. 338, 94 L.Ed. 150 (1949); *United States v. Oregon State Medical Society*, 343 U.S. 326, 96 L.Ed. 978 (1952); *United States v. United States Gypsum Co.*, 333 U.S. 364, 94 L.Ed. 746 (1948).

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

United States v. United States Gypsum Co., at page 395.

In the instant case, notwithstanding any question of the credibility of the testimony, a matter particularly for the determination of the trial judge, there is no evidence of record to support a conviction that a mistake had been made by the District Court nor to support the finding of fact independently made by the Circuit Court.

The Circuit Court further mischaracterized the testimony of Deputy to the Mayor Zecca in footnote 13 of its opinion wherein the Court stated that Mr. Zecca "apparently thought that only the AFL-CIO and the Greater Philadelphia Chamber of Commerce fit the specifications, respectively, of Section 12-206 (b) (1) and (2)." (Appendix to Pet. for Cert. p. 43-4). In so criticizing Mr. Zecca the Circuit

Court apparently overlooked his testimony that the Joint Building Trades Council could qualify under Section 12-206 (b) (1) (N.T. 250, Appendix 85a), and further overlooked his testimony that the Philadelphia Industrial Development Corporation, HUD and the Port Development Corporation could qualify under sub-section (2) of Section 12-206 (b). (N.T. 251, Appendix 86a)

In finding direct discrimination, the Circuit Court found that there were "black oriented organizations" which could have met the specifications of Section 12-206 (b). (Appendix to Pet. for Cert. p. 43). This finding of the Circuit Court is apparently taken from the Finding of Fact No. 16 of the District Court:

> 16. There are several organizations reflecting the views and participation of the black community which could qualify under sub-sections 1, 2, 3, 4, 5, 6, and 9 of Section 12-206 (b). (7 of the 9 enumerated classes.)"

(Appendix to Pet. for Cert., p. 31)

The question of whether a particular organization satisfies the requirements of the Educational Supplement is, of course, a mixed question of fact and law; and it is submitted that several of the organizations recommended by plaintiffs do not qualify under the Educational Supplement, and that plaintiffs have failed to recommend any qualified organization for subsections 1, 3, 7 and 8. Plaintiffs have suggested thirteen groups as alternatives to the organizations chosen by the Mayor pursuant to the Educational Supplement. Of the thirteen, six fail to qualify under the Educational Supplement since they are not "City-wide" in scope. The United Negro Trade Union, the Black Educational Forum, the City-wide Black Community Council and the Black Youth Forum do not qualify because of their racial exclusivity. (N.T. 5-8, Appendix 33a-36a). The North City Congress and the Residents' Advisory Board, limited in geographical and representative scope, are also not "City-wide".

Of the seven suggested organizations that could qualify under the Educational Supplement, three (Urban League, NAACP and Health and Welfare Council) have been named to past panels.[7] (Appendix 24a-30a). The Panel member from the Citizens' Committee on Public Education in Philadelphia (not recommended by plaintiffs) has been black for three out of the four Panels. Furthermore, the Federation of Community Councils, twice chosen under Section 12-206 (b) (5), includes among its past vice presidents plaintiff W. Wilson Goode. (N.T. 7, Appendix 35a)

Upon comparison to the various other racial and ethnic groups in the City of Philadelphia, it is apparent that blacks have been very adequately represented. The 1971 Panel consisted of five white Anglo-Saxon Protestants, three Irish, two blacks, two Jews and one Scandinavian. There were no Italians or Poles on that Panel (there has never been a Pole on the Panel) despite the fact that Italians and Poles are among Philadelphia's largest ethnic minorities.

Finally, the Circuit Court's finding of racial discrimination was manifestly unfair to former Mayor Tate. The Circuit Court held that his appointments to the Panel were "tainted"; that there was direct proof of his personal discrimination against black people.

Without attempting to portray former Mayor Tate as anything more than an astute politician, the record he established over his decade of public service evidences a firm commitment to the expansion of opportunities to minority groups, including blacks, at all levels of public service employment as well as in political appointments.

The unrebutted evidence on this record shows that at the time of trial approximately 41% of all City employees were black; that the percentage had risen markedly during

7. Interestingly, one panel member from the Urban League, William S. Rawls, and one panel member from the Health and Welfare Council, Frederick L. Ballard, Esq. were both white men. Furthermore, W. Park Woodrow, present President of the Health and Welfare Council, was appointed to the 1973 Educational Nominating Panel. Mr. Woodrow is white.

the ten-year Tate administration;[8] that between 23% and 24% "of the management personnel in supervisory positions or middle management are minority individuals [Blacks and Spanish speaking Americans, N.T. 342, Appendix 101a]"; that in private industry the percentage of minorities in middle management is approximately 5½%; and that the percentage of persons from minority groups on appointive governmental boards and commissions has increased during the Tate administration. (N.T. 338-42 Appendix 76a-79a).

The evidence also indicates that nationally only 4.1% of all households with an annual income in excess of $15,000 are black, and that the City, under Mayor Tate's administration, exceeded the national average in every respect.[9] Thus although the Mayor can exert only an indirect influence on the hiring and promotion of Civil Service employees, 6.07% of the Civil Service employees earning over $15,000 annually are black. The Mayor has a much greater degree of influence in hiring for positions exempt from Civil Service, and of those positions paying over $15,000 per year, 9.12% are filled by black persons. The Mayor has full discretion with regard to appointment to City boards and commissions, and 12.11% of the members of the various boards and commissions were black. (P-6, Appendix 122a-23a).

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8. Since the population of the City of Philadelphia is approximately 33% black, black persons are obviously statistically overrepresented among City employees, and also quite obviously some other ethnic or racial groups must be under-represented. The 35,454 City employees clearly represent a statistical sample superior to the 13-member Educational Nominating Panel. Therefore, under the legal and statistical theories advanced by the plaintiffs, the City should consciously adjust the number of black employees downward to insure the proper ethnic mix in City employment.

9. The figures presented with regard to City employees relate to an individual wage earner, rather than to a household's income. The national percentage of black individuals earning more than $15,000 per year would be considerably lower. (N.T. 365-6, Appendix 118a-119a).

It is not significant that the percentages with regard to City employees earning over $15,000 per year, are substantially less than the proportion of blacks in the City of Philadelphia. Because of the level of professional and/or technical expertise needed for these positions (e.g. lawyers in the City Solicitor's office), the only relevant criteria upon which a statistical comparison can be made is the percentage of blacks in the employable pool pertient to a particular job (e.g. percentage of blacks among Philadelphia's lawyers).

The record in the District Court discloses an ever-increasing number of black persons employed at all levels of governmental service over the decade of former Mayor Tate's administration. And yet, as the result of the Circuit Court's opinion, the final, unfair judgment of Mayor Tate's administration is one of discrimination against blacks on the basis of their race. The evidence of non-discriminatory public service was overwhelming; the evidence to the contrary was insubstantial.

IV. The Circuit Court erred in ruling that plaintiffs had established a prima facie case of racial discrimination.

The Circuit Court found that there was an opportunity for discrimination and that the League demonstrated a statistical under-representation of blacks on the Panel. The Court then held that a prima facie case of discrimination had been established which the City failed to rebut. It is submitted that since an essential issue presented in this case is the judicial review of the Mayor's discretionary appointment power, as limited by the definite statutory qualifications of the Educational Supplement, which the League has chosen not to challenge, the formula for shifting the burden of proof used by the Circuit Court is inappropriate.

The case of *Carter v. Greene County*, 396 U.S. 320, 24 L. Ed. 2d 549 is similar to the case at bar in that plain-

tiffs there sought an order compelling the Governor of Alabama to appoint blacks to the County Jury Commission. That case arose from a class action filed by black citizens of Greene County, Alabama which alleged racial discrimination in the selection of prospective jurors and in the appointment of an all-white jury commission in the predominately black county. Under relevant Alabama law, jurors are selected by a 3-member jury commission which is appointed by the Governor.

The District Court found that there had been systematic discrimination in the preparation of jury lists, but declined to direct the Governor to appoint blacks to the jury commission. 298 F. Supp. 181.

On appeal, this Court considered the evidence that, for many years (at least 12 years), the jury commission had been composed entirely of white men and agreed with the lower court that plaintiffs had failed to prove their claim. At page 338, this Court held:

> Quite apart from the problems that would be involved in a federal court's ordering the Governor of a state to exercise his discretion in a particular way, we cannot say on this record that the absence of Negroes from the Greene County Jury Commission amounted in itself to a prima facie showing of discriminatory exclusion.

Plaintiffs made a further argument to this Court contending that the District Court should have compelled the appointment of blacks to the jury commission because of an alleged causal connection between the absence of blacks on the jury commission and the discriminatory selection of jurors; and that, for the jury commission to function properly, it must be representative of the community in which it functions. This Court did not agree with that logic, but rather held at page 339:

> The appellants are no more entitled to proportional representation by race on the jury commission than on any particular grand or petit jury.

Similar to the *Carter* case, the League in the instant case has demanded that the Federal Court order the Mayor of Philadelphia to exercise his discretion in a particular manner. In the instant case, the Circuit Court has held that the League established a prima facie case of discrimination on the basis of far less evidence of discrimination than was present in *Carter v. Greene County*. The statistical evidence presented in *Carter* was significant and persuasive (as to discrimination in jury selection) while the League's statistical evidence is meaningless. In *Carter*, the performance of those appointed to the jury commission was proven to be racially discriminatory. In the instant case, the plaintiffs have not challenged the performance of the Panel in nominating persons for service on the Board of Education.[10] Therefore, despite evidence which indicated a total exclusion from appointive governmental service and despite a finding of fact that those appointed systematically excluded blacks from jury service, this Court held in *Carter*, that a prima facie case of discriminatory exclusion from appointive public office had not been established. It is submitted that the Circuit Court here, on the basis of virtually no evidence of discrimination, erred in reversing the District Court and holding that a prima facie case of discrimination had been established.

The Circuit Court further erred in its assessment of the extent of plaintiffs' constitutional rights, and in its interpretation of this Court's holding in the case of *Turner v. Fouche*, 396 U.S. 346, 324 L.Ed. 2d 597 (1970).

Turner v. Fouche was a suit by a class of black plaintiffs who challenged the constitutionality of the method of selection of juries and school boards in use in many counties in Georgia. The statutory scheme at issue pro-

10. Counsel for plaintiffs conceded that this case is not concerned "with the composition of the School Board." (N.T. 266). Furthermore in the words of the Circuit Court, "there was nothing in the record to suggest any impropriety whatsoever on their [Panel members] part." (Appendix to Pet. for Cert., p. 48, note 18).

vided that the County Board of Education consist of five freeholders selected by the Grand Jury which in turn was selected from a jury list selected by a six-member County Jury Commission.

This Court held that plaintiffs had established an unrebutted prima facie case of racial discrimination by demonstrating a substantial disparity between the percentages of negro residents in the County (60%) and the percentage of negroes on the jury list, and that 96% of those rejected as unintelligent or not upright were negro. This Court also delineated the federally protected rights of the *Turner* plaintiffs at page 363, as follows:

> We may assume that appellants have no right to be appointed to the Taliaferro County board of education. But the appellants and the members of their class do have a Federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications.

In distinguishing between consideration for appointment and appointment itself, this Court reaffirmed a distinction it had long since made in jury selection cases. Since *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880), this Court has consistently held that systematic exclusion of negroes from grand juries and/or trial juries was unconstitutional, and this Court has consistently reversed criminal convictions on the basis of such systematic exclusion. *Sims v. Georgia*, 389 U.S. 404, 19 L.Ed. 2d 634 (1967); *Jones v. Georgia*, 389 U.S. 24, 19 L.Ed. 2d 25 (1967); *Whitus v. Georgia*, 385 U.S. 544, 17 L.Ed. 2d 599 (1967); *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 759 (1965).

Also since 1880, this Court has been equally consistent in holding that a defendant has no right to demand the members of his race be included on the particular jury that indicts or convicts him. *Virginia v. Rives*, 100 U.S. 313, 25 L.Ed. 667 (1880); *Gibson v. Mississippi*, 162

U.S. 565, 40 L.Ed. 1075 (1896); *Martin v. Texas*, 200 U.S. 316, 50 L.Ed. 498 (1906); *Akins v. Texas*, 325 U.S. 398, 89 L.Ed. 1692 (1945); *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 759 (1965); cf. *Hoyt v. Florida*, 368 U.S. 57, 7 L.Ed. 2d 118 (1961).

There can be no discrimination against any racial or ethnic group in considering persons for jury service. Thus a severe disparity between the percentage of blacks eligible for jury service and the percentage of blacks on general jury lists indicates racial discrimination in consideration for jury service. On the other hand a similar disparity on any particular jury is meaningless for no one has the right to be selected to a jury or to have members of his race on the particular jury hearing his case. Indeed, this Court has held that a prosecutor may use the peremptory strike to eliminate *all* of an accused race from a jury. *Swain v. Alabama*, 380 U.S. 202, 221, 13 L.Ed. 2d 759 (1965).

In analogizing to the case at bar, while plaintiffs here arguably may have a right protected by the 14th Amendment to be *considered* for political appointment, they have no constitutional right to political appointment. Therefore in applying *Turner v. Fouche* to the instant case, one must be aware that *Turner* considered those aspects of the school board's selection system which operated to discriminate against blacks in being *considered* for service on the school board, i.e., the discriminatory grand jury selection and the "freeholder" qualification for school board membership.

Thus, a prime factual issue in this case is whether Mayor Tate discriminated against blacks in *considering* persons for service on the Educational Nominating Panel. There is neither evidence nor allegation in the record indicating such discrimination. Moreover, the only evidence related to this issue are the uncontested facts that blacks were appointed to each of the Panels. Necessarily, therefore, blacks could not have been denied consideration for appointment.

In the instant case, the Circuit Court refused to distinguish between consideration for appointment to public office and appointment itself, but rather incorrectly held that "discrimination in the appointment of the Panel was impermissable." (Appendix to Pet. for Cert., p. 46). This holding is inconsistent with the relevant decisions of this Court. Since the maximum extent of plaintiffs' 14th Amendment rights is that they may not be discriminated against in being considered for public office, and since no evidence was introduced to indicate that they were unconstitutionally denied such consideration, it is submitted that the Educational Equality League failed to establish a prima facie case of violation of any federally protected right.

V. Prospective application of injunctive relief against present Mayor Frank L. Rizzo, who has never been a party to this action, is improper, particularly where the sole basis for such injunctive relief is a finding of personal discrimination on the part of former Mayor Tate.

The present suit was brought against former Mayor James H. J. Tate. At no time was evidence produced regarding the administration of present Mayor Frank L. Rizzo, Tate's successor in office. Nevertheless, Circuit Court ordered the staff of Mayor Rizzo to submit to the District Court evidence of non-discrimination in appointments to the Educational Nominating Panel.

Footnote 21 of the Circuit Court's decision suggests the rationale for this direction to the District Court.

> 21. Mayor Tate has been succeeded by the Honorable Frank L. Rizzo and the present case, has, of course, *involved no showing that Mayor Rizzo has in any way discriminated against blacks.* Nevertheless, *on this record,* Mr. Zecca continues as a Deputy Mayor and since this Court finds the plaintiff has shown

> on this record discrimination in regard to the present Panel, the Federal Courts must assure that the appointment of the 1973 Panel is free from taint. Cf. *Conover v. Montemuro*, — F.2d — (1972) (3rd Cir. No. 71-1871, filed December 20, at page 13). [Emphasis ours]

(Appendix to Pet. for Cert., p. 27-8)

There is no record to substantiate the assumption that Mr. Zecca today has any responsibility for appointments to the Panel. In fact, the decision of the District Court in this matter was made prior to Mayor Rizzo's election, therefore, there could be no evidence whatsoever before the Circuit Court regarding the practices of the present Mayor.

Presently Mr. Zecca is a Deputy to Mayor Rizzo. Under Mayor Tate he was alone in this position, however in the Rizzo administration, Philip R. T. Carroll is the Mayor's immediate subordinate, and it is he who oversees the Mayor's Office. Mr. Zecca, as Deputy to the Mayor, shares this title with Michael Wallace, Esquire and Joseph P. Braig, Esquire. In addition, there are now three assistants to the Mayor. Based on the change in the administration and in the Mayor's immediate staff, it would be reasonable to assume that the nomination process for membership or appointments to the various Boards and Commissions within City government has been considerably altered. Although there is no evidence bearing on this subject, the fact is that the procedure for filling such positions, including the Educational Nominating Panel, has been completely revised with Mr. Zecca having no responsibility for those appointments."[11]

It is well-settled that a district court's denial of injunctive relief will not be reversed unless such denial constitutes an abuse of discretion. *Barton v. Eichelberger*, 451

11. Although it may be deemed improper to deviate from the factual record, such deviation is necessitated by the Circuit Court's unwarranted and unsubstantiated assumption with regard to Mr. Zecca's duties in the Rizzo administration.

F.2d 263 (3rd Cir., 1971). Here the District Court refused to grant injunctive relief; yet the Circuit Court, *admittedly without any evidence of racial discrimination on the part of Mayor Rizzo*, directed the District Court to require Mayor Rizzo to submit evidence of his non-discrimination in his appointments to the 1973 Panel. This order of the Circuit Court is a clear abuse of judicial discretion.

Furthermore, in directing the District Court to issue an injunction against Mayor Rizzo, the Circuit Court ignored the constraints of Federal Rule of Civil Procedure 65(d) which provides:

> Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

There was no evidence indicating that Mayor Rizzo in any way acted in concert with Mayor Tate or otherwise participated in Mayor Tate's appointments to the Panel. Therefore there was no factual or legal justification whatsoever for subjecting Mayor Rizzo's appointments to judicial scrutiny, notwithstanding any taint which the Circuit Court felt may have existed with regard to Mayor Tate's appointments.

In the words of Judge Learned Hand:

> . . . [N]o court can make a decree which will bind anyone but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who can therefore can have their day in court.

Alemite Manufacturing Corp. v. Staff, 42 F.2d 832 (2nd Cir., 1930); see also *Chase National Bank v. City of Norwalk*, 291 U.S. 431, 437, 78 L.Ed. 894 (1934); *Regal Knitwear Co. v. National Labor Relations Board*, 324 U.S. 9, 89 L.Ed. 661 (1944); *Krese v. General Steel Castings Corp.*, 179 F.2d 760, 763 (3rd Cir., 1950); *Swetland v. Curry*, 188 F.2d 841 (6 Cir. 1961).

Furthermore, since appointments to the Panel are personal, discretionary appointments of the individual Mayor, Mayor Rizzo's appointments are completely independent of former Mayor Tate's influence and may not be enjoined or otherwise directly effected by judicial action arising out of a case in which he was not involved. As this Court stated in *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13, 89 L.Ed. 667 (1944):

> The courts, nevertheless, may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.

The question of prospective injunctive relief, based on the actions of an outgoing executive official, applied to his successor in office, arose in the case of *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 179 F. Supp. 944 (1959). There, the plaintiffs alleged, inter alia, that the local District Attorney was enforcing Pennsylvania's "Sunday Closing Laws" discriminatorily. Plaintiff sought an order enjoining the enforcement of the laws. After noting that there was no factual basis for the issurance of such an injunction, the three judge court for the Eastern District of Pennsylvania stated at page 953 that, "The impracticality of such an anticipatory finding is made more obvious by the fact . . . that the term of office of the defendant as District Attorney expires at the end of the calendar year 1959." The three judge court decided this case on December 1, 1959. On appeal, this Court affirmed the three judge

court's reasoning in its refusal to exercise its injunctive powers, notwithstanding that the new District Attorney had been joined as an additional defendant, *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 588, 6 L.Ed. 2d 551 (1961). Mayor Rizzo, of course, has never been joined in the case at bar.

In the case of *Barton v. Eichelberger*, 451 F.2d 263 (1971), the Third Circuit Court of Appeals considered the propriety of the District Judge's dismissal of a class action for injunctive relief under the Civil Rights Act arising out of riots occuring in York, Pennsylvania. In affirming the denial of injunctive relief, the Third Circuit Court held at page 266:

> In light of the totality of the circumstances prevailing in the instant case, we cannot say that the District Court abused its discretion in denying the injunctive relief sought by plaintiffs.

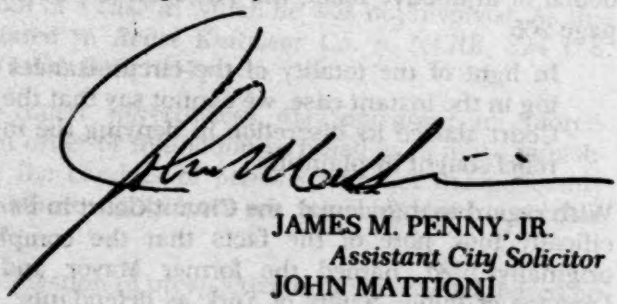
With regard to that denial, the Circuit Court in *Barton* specifically took note of the facts that the complaint, as originally filed, named the former Mayor and former Director of Public Safety of York as defendants; that the Mayor originally named as a defendant died after the complaint was filed and the new Mayor was substituted for him as a defendant, and that the new Mayor appointed a new Director of Public Safety who was also then substituted as a fefendant.

In the instant case, the Circuit Court showed no reluctance whatsoever in interfering, via an injunction, with the new Mayor's administration of City government, notwithstanding that the new Mayor is not a party to the action. It is therefore submitted that the Circuit Court was in error in ordering that an injunction be issued against Mayor Rizzo since Mayor Rizzo had not even been elected at the time of the evidentiary hearing in this matter, since the Circuit Court admits to a *total* dearth of evidence with regard to Mayor Rizzo, and since Mayor Rizzo is not now, nor was he ever a party to this action.

CONCLUSION

For the foregoing reasons, it is submitted that the Circuit Court of Appeals was in error in reversing the decision of the District Court. Petitioners, James H. J. Tate and the Educational Nominating Panel, respectfully request that this honorable Court reverse the decision of the Circuit Court and reinstate the Order of the District Court to dismiss the complaint to this action with prejudice.

Respectfully submitted,



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